

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LVB-OGDEN MARKETING, LLC,

Plaintiff,

v.

DAVID S. BINGHAM, SHARON BINGHAM,
CHRISTOPHER BINGHAM, CHERISH
BINGHAM, KELLY BINGHAM, BINGO
INVESTMENTS, LLC, CCRB
ENTERPRISES, LLC, PARK PLACE
MOTORS, LTD., HYTECH POWER, INC.,
CICILIA ELALI (f/k/a CICILIA PARK),
HENRY DEAN, in his individual capacity and
as Trustee for the SHARON GRAHAM
BINGHAM 2007 TRUST, and BGH
HOLDINGS, LLC,

Defendants.

NO. 2:18-cv-00243-TSZ

SUPPLEMENTAL BRIEF OF SHARON
GRAHAM BINGHAM 2007
TRUST/DEAN AS TRUSTEE

SUPPLEMENTAL BRIEF OF SHARON GRAHAM BINGHAM 2007
TRUST/DEAN AS TRUSTEE - i
(17-cv-00528-TSZ)

6615216.1

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I. INTRODUCTION

On August 17, 2018, the Court entered a Minute Order at Dkt. No. 132. The Minute Order directs the parties to file supplemental briefs on three issues. The Sharon Graham Bingham 2007 Trust/Henry Dean in his capacity as Trustee of the Sharon Graham Bingham 2007 Trust (the “SGB 2007 Trust”) submits this brief with respect to Issue 1. With respect to Issue 3, the SGB 2007 Trust believes the Court should not bifurcate the trial into two or more stages, for reasons advanced in the Joint Status Report at Dkt. No. 127 at 6:7-9:5, and for the reasons set forth in the supplemental briefs of other defendants. For ease of reference, Issue 1 was articulated by the Court as follows:

Issue 1: The record before the Court demonstrates that the Trust holds two judgments of \$23,290,953 and \$57,617,482, respectively, against the same debtors as Plaintiff. *See* Declaration of Henry W. Dean, Trustee in Support of Response to Motion for Preliminary Injunction, docket no. 38, Exhibit H (the “Umpqua Judgment”), Exhibit L (assignment of the Umpqua Judgment), Exhibit R (the “Centrum Judgment”); Declaration of R. Bruce Johnston in Opposition to Plaintiff’s Motion for Preliminary Injunction, docket no. 35, Exhibit 1A (assignment of the Centrum Judgment). The parties are DIRECTED to address whether there is any legal or equitable reason why those judgments would not have priority over Plaintiff’s judgment.

Dkt. No. 132 (Minute Order) at page 2.

Plaintiff’s First Amended and Verified Complaint seeks, in part, a declaration “[t]hat the Sharon Graham Bingham 2007 Trust has lost any spendthrift character that it had, and that LVB is therefore entitled to execution of the assets of the Trust to satisfy its judgment.”¹ Plaintiff alleges that Sharon Graham Bingham has “. . . the means to direct the assets and income of the trust”² Because the priority of a particular judgment depends on the particular asset at issue, the discussion below will be organized by asset or a group of assets, where appropriate.

¹ Dkt. No. 82 (First Amended and Verified Complaint) at ¶ 118.b.

² Dkt. No. 82 (First Amended and Verified Complaint) at ¶¶ 113, 114.

II. ARGUMENT & AUTHORITY

A. The Umpqua Bank judgment and Centrum Financial Services, Inc. judgment proceeded from exempt trust assets.

The Umpqua Bank judgment was entered in King County Superior Court on June 19, 2009. Dkt. No. 42 at Exhibit H. The judgment in favor of Centrum Financial Services, Inc. was entered in King County Superior Court on March 15, 2013. Dkt. No. 42 at Exhibit R.

There is no dispute that: (1) the Sharon Graham Bingham 2007 Trust was settled by someone besides the beneficiary (Frances Graham) with assets that did not belong to the beneficiary (the 116.33 shares of O.D. Fischer Company).³ There is also no dispute that the O.D. Fischer Company shares generated approximately \$11.8 million in cash in September of 2008 when Safeco was acquired by Liberty Mutual.⁴ There has been no assertion, and nor could there be, that the funds used to purchase the Umpqua Bank judgment and Centrum Financial Services, Inc. judgment did not proceed from trust property exempt from execution. See RCW 6.32.250. The judgments are thus not assailable by LVB, or any other creditor.

B. The extent of priority over the real estate assets of David and Sharon Bingham.

Judgment debtors David Bingham and Sharon Bingham have title to the following real properties: (1) Unit 1113 of the Kaanapali Ali'i condominiums located at 50 Nohea Kai Drive, Lahaina, HI 96761; (2) Unit 1115 of the Kaanapali Ali'i condominiums located at 50 Nohea Kai Drive, Lahaina, HI 96761; and (3) 9215 S.E. Shoreland Dr., Bellevue, WA 98004.⁵

1. Unit 1113 of the Kaanapali Ali'i condominiums.

A title report for Unit 1113 of the Kaanapali Ali'i condominiums reflects that the \$23,290,953.14 Umpqua Bank judgment was recorded against Unit 1113 on August 19, 2009.⁶

³ Dkt. No. 42 (Declaration of Henry W. Dean, Trustee in Support of Response to Motion for Preliminary Injunction) at ¶ 2.

⁴ Dkt. No. 42 at ¶ 2.

⁵ Dkt. No. 83 (balance sheet filed under seal); Dkt. No. 42 (Declaration of Henry W. Dean).

⁶ Dkt. No. 42 (Exhibit V-page 6 to Dean declaration).

1 The March 23, 2016 title report contained at Exhibit V to Mr. Dean's declaration at Dkt. No.
 2 42 reflects LVB did not record its judgment against Unit 1113. Accordingly, the judgment
 3 held by the SGB 2007 Trust has priority over LVB's judgment with respect to Unit 1113. In
 4 addition, as the title report reflects, a mortgage to secure an indebtedness in favor of Centrum
 5 Financial Services, Inc. was recorded on May 5, 2008 and this was assigned to the SGB 2007
 6 Trust by Centrum Financial Services, Inc. *See Dkt. No. 35-2* at page 43 of 68 to 46 of 68.
 7 Accordingly, the SGB 2007 Trust also has priority over LVB to Unit 1113 by means of the
 8 Centrum mortgage.⁷

9 2. Unit 1115 of the Kaanapali Ali'i condominiums.

10 A title report for Unit 1115 of the Kaanapali Ali'i condominiums reflects that the
 11 \$23,290,953.14 Umpqua Bank judgment was recorded against Unit 1115 on August 19, 2009.⁸
 12 The March 23, 2016 title report contained at Exhibit W to Mr. Dean's declaration at Dkt. No.
 13 42 reflects LVB did not record its judgment against Unit 1115. Accordingly, the judgment
 14 held by the SGB 2007 Trust has priority over LVB's judgment with respect to Unit 1115. In
 15 addition, as the title report reflects, a mortgage to secure an indebtedness in favor of Centrum
 16 Financial Services, Inc. was recorded on May 5, 2008 and this was assigned to the SGB 2007
 17 Trust by Centrum Financial Services, Inc. *See Dkt. No. 35-2* at page 39 of 68 to 42 of 68.
 18 Accordingly, the SGB 2007 Trust also has priority over LVB to Unit 1115 by means of the
 19 Centrum mortgage.⁹

20 3. 9215 S.E. Shoreland Dr., Bellevue, WA 98004

21 A title report for 9215 S.E. Shoreland Drive, Bellevue, WA 98004 reflects that the
 22 \$23,290,953.14 Umpqua Bank judgment was recorded against the Bingham's Washington
 23

24 ⁷ In footnote 10 of his declaration at Dkt. No. 42, Mr. Dean explains that there was a change in the unit number
 from 1103 to 1113.

25 ⁸ Dkt. No. 42 (Exhibit W-page 6 to Dean declaration).

⁹ In footnote 10 of his declaration at Dkt. No. 42, Mr. Dean explains that there was a change in the unit number
 from 1105 to 1115.

1 residence on June 19, 2009.¹⁰ The title report also reflects that Centrum Financial Services,
 2 Inc. recorded its \$57,617,482.96 judgment against the residence on March 15, 2013.¹¹ The
 3 judgment LVB currently seeks to enforce does not appear in the title report. This may be
 4 because LVB failed to record the judgment with the King County Recorder's Office.

5 A judgment lien attaches to non-exempt real property when it "commences," which
 6 depends on the counties of the judgment and real property. RCW 4.56.190. When a
 7 Washington superior court judgment is entered in the same county as the judgment debtor's
 8 real estate, the lien commences from the time of the filing by the county clerk upon the
 9 execution docket in accordance with RCW 4.64.030. RCW 4.56.200; RCW 4.64.030. The
 10 Umpqua Bank judgment was entered on the execution docket on June 19, 2009. *See* Appendix
 11 1.¹²

12 Pursuant to 28 U.S.C. § 3201(a) and 26 U.S.C. § 6323, a judgment in a civil action
 13 creates a lien on all real property of a judgment debtor on the filing of a certified copy of the
 14 abstract of judgment in either the District Court in which the property is situated, or with the
 15 pertinent county. LVB registered its judgment in the Western District of Washington on
 16 October 15, 2010.¹³ The Umpqua Bank judgment held by the SGB 2007 Trust has priority
 17 over LVB with respect to the 9215 S.E. Shoreland Dr., Bellevue property.¹⁴ *See e.g., Bank of*
 18 *America, N.A., v. Owens*, 173 Wn.2d 40, 50, 266 P.3d 211 (2011) (a judgment lien on real
 19 property takes priority from the date the judgment is recorded).

20
 21 ¹⁰ Dkt. No. 35-10 (Declaration of R. Bruce Johnston in Opposition to Plaintiff's Motion for Preliminary
 Injunction) at page 3 of 6.

22 ¹¹ Dkt. No. 35-10 (Declaration of R. Bruce Johnston in Opposition to Plaintiff's Motion for Preliminary
 Injunction) at page 5 of 6.

23 ¹² The Court may take judicial notice of the entry of the judgment on the execution docket pursuant to Fed. R.
 Evid. 201.

24 ¹³ Dkt. No. 5 (Declaration of Jonathan J. Faria in Support of Plaintiff's Motion for Temporary Restraining Order
 and/or Preliminary Injunction) at Exhibit 3.

25 ¹⁴ Furthermore, there is no evidence LVB recorded its judgment with the King County Recorder's Office, which is
 necessary for the judgment to have become a lien on homestead property located in King County. *See* RCW
 6.13.090.

C. The extent of priority over the real estate assets of Chris and Cherish Bingham.

Chris and Cherish Bingham occupy 3200 80th Ave. NE, Hunts Point, WA 98004. As provided for in Mr. Dean's declaration at Dkt. No. 42 at page 32 of 40, this was the long-time residence of Frances Graham, the settlor of the SGB 2007 Trust. The \$23,290,953.14 Umpqua Bank judgment was recorded against the residence on June 23, 2009.¹⁵

Pursuant to 28 U.S.C. § 3201(a) and 26 U.S.C. § 6323, a judgment in a civil action creates a lien on all real property of a judgment debtor on the filing of a certified copy of the abstract of judgment in either the District Court in which the property is situated, or with the pertinent county. LVB registered its judgment in the Western District of Washington on October 15, 2010.¹⁶ The Umpqua Bank judgment held by the SGB 2007 Trust has priority over LVB with respect to the 3200 80th Ave. NE, Hunts Point, WA property.¹⁷ *See e.g., Bank of America, N.A., v. Owens*, 173 Wn.2d 40, 50, 266 P.3d 211 (2011) (a judgment lien on real property takes priority from the date the judgment is recorded).

D. The extent of priority over personal property formerly owned by the judgment debtors.

As conceded by LVB, possession of the personal property identified in the balance sheet filed at Dkt. No. 83 lies within Henry Dean in his capacity as Trustee of the Sharon Graham Bingham 2007 Trust. *See Dkt. No. 137* (Motion for Summary Judgment) at page 7 line 7 to page 9 line 6. Ignoring for the purposes of this brief the fact that legal title of the personal property passed to the Trustee in satisfaction of loans (which proceeded from exempt trust assets) made by the Trustee to the judgment debtors, the Umpqua Bank judgment and

¹⁵

<https://recordsearch.kingcounty.gov/LandmarkWeb/search/index?theme=.blue§ion=searchCriteriaParcelId&quickSearchSelection=>

¹⁶ Dkt. No. 5 (Declaration of Jonathan J. Faria in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction) at Exhibit 3.

¹⁷ Furthermore, there is no evidence LVB recorded its judgment with the King County Recorder's Office, which is necessary for the judgment to have become a lien on homestead property located in the King County. *See* RCW 6.13.090.

1 Centrum Financial Services, Inc. judgment separately and independently give the Trustee
2 priority to the personal property formerly owned by the judgment debtors.

3 The balance sheet filed under seal at Dkt. No. 83 reflects the following personal
4 property to which the judgment debtors formerly had title: (1) shares in Park Place Motors,
5 Ltd.; (2) the 1,263,333 shares of Biolytical Laboratories, Inc., a Canadian corporation; (3) the
6 Prium Note (formerly belonging to judgment debtor Bingo Investments, LLC); (4) shares in
7 Plasma Drive (formerly held by Bingo Venture Capital, LLC which is not a judgment debtor of
8 LVB but was wholly owned by judgment debtors); (5) the matrimonial rings; and (6) the
9 Bingham family's furniture, fixtures, equipment and appliances. As a result of the Umpqua
10 Bank judgment, Centrum Financial Services, Inc. judgment, and the Trustee's possession of the
11 property, the Trustee has priority over these personal property assets. No authority exists for a
12 sheriff or United States Marshal to seize property from one creditor, regardless of whether that
13 property was previously taken from a judgment debtor, to satisfy the claims of another creditor.

14 What's more, the Trustee has the benefit of the writ of execution obtained by
15 Washington Trust Bank. There is no dispute that Washington Trust Bank obtained a judgment
16 against the same debtors liable on LVB's judgment. *See* Exhibit P to the Dean declaration at
17 Dkt. No. 42. There is also no dispute that on or about January 25, 2011, Washington Trust
18 Bank obtained a writ of execution against the judgment debtors and was, along with the King
19 County Sheriff, at the doorsteps of the residence of David and Sharon Bingham for the purpose
20 of seizing all personal property of the Bingham. *See* Dkt. No. 42 at ¶¶ 18-20. Even if the
21 Sheriff did not actually take physical possession of the personal property prior to the Trustee
22 executing the settlement agreement with Washington Trust Bank, thereby affording the Trustee
23 a statutory lien against the personal property pursuant to RCW 4.56.190, the issuance of the
24 writ of execution in favor of Washington Trust Bank, and the right of the Trustee to be
25 equitably subrogated to Washington Trust Bank for the amounts paid by the Trustee

1 (\$1,030,000) to Washington Trust Bank, afford the Trustee an equitable lien on the personal
 2 property with a greater priority than that of LVB securing at least \$1,030,000. *See e.g., Bank*
 3 *of America, N.A., v. Owens*, 173 Wn.2d 40, 49-50, 266 P.3d 211 (2011) (“Where a statutory
 4 lien is unavailable, a court may create an equitable lien.”).

5 E. The extent of priority over the M/V Bingo.

6 Title to the M/V Bingo is vested in David Bingham and Sharon Bingham. Neither the
 7 Umpqua Bank judgment nor Centrum Financial Services, Inc. judgment grants the Trustee
 8 priority in the M/V Bingo, unless the Trustee elects to cause the vessel to be arrested (again).¹⁸
 9 However, it is undisputed that the judgment debtors executed a \$600,000 note and preferred
 10 marine mortgage in favor of the SGB 2007 Trust and that preferred marine mortgage was
 11 recorded with the United States Coast Guard on September 20, 2011.¹⁹ Accordingly, to the
 12 extent LVB elects to arrest the M/V Bingo and causes the vessel to be sold, the SGB 2007
 13 Trust will have priority to the first \$600,000 of proceeds.

14 F. The extent of priority over the personal property never owned by the judgment debtors.

15 It is undisputed that the shares held by the Trustee in HyTech Power, Inc., the
 16 promissory note owed by Park Place Motors, Ltd., the three (3) miscellaneous promissory
 17 notes with a combined value of \$20,000, and any cash on hand were never owned by any of
 18 judgment debtors. There is no dispute possession of these assets identified in the balance sheet
 19 filed at Dkt. No. 83 lies within Henry Dean in his capacity as Trustee of the Sharon Graham
 20 Bingham 2007 Trust. Ignoring for the purposes of this brief the fact that these assets
 21 proceeded from the assets that were settled by Frances Graham for Sharon Graham Bingham’s
 22 benefit, the Umpqua Bank judgment and Centrum Financial Services, Inc. judgment separately
 23 and independently give the Trustee priority to these personal property assets. Even if the Court
 24

25 ¹⁸ Dkt. No. 42 at ¶ 24.b.

¹⁹ Dkt. No. 35 at 13.b; Dkt. No. 42 at ¶ 24.b.

holds that Sharon Graham Bingham controls the Trustee/has the equivalent of an ownership interest with respect to the SGB 2007 Trust, no authority exists for a sheriff or United States Marshal to seize property from one creditor to satisfy the claims of another creditor.

G. The extent of priority over real property titled in the Trustee/SGB 2007 Trust.

Title to 721 250th Lane NE, Sammamish WA was conveyed to the Trustee by means of a Quit Claim Deed from Scott and Kelly Bingham on February 28, 2014. The Quit Claim Deed was recorded on October 21, 2014.²⁰ Because the Umpqua Bank judgment was entered in King County Superior Court, a judgment lien attached to the former property of Scott and Kelly Bingham in 2009, prior to when LVB obtained and registered its judgment in the Western District. RCW 4.56.190; RCW 4.56.200. Accordingly, the Umpqua Bank judgment gives the Trustee/SGB 2007 Trust priority over the 721 250th Lane NE, Sammamish WA property. However, this discussion is highly academic as KeyBank is secured for a significant amount on the property and the public record reflects other liens/judgements on the property with greater priority than LVB.²¹ See Appendix 2 (state court order granting KeyBank leave to amend its judicial foreclosure complaint to add LVB as a party).

III. CONCLUSION

There is no dispute that the Umpqua Bank judgment and Centrum Financial Services, Inc. judgment held by the Trustee/SGB 2007 Trust proceeded from exempt trust property. The judgment lien arising out of the Umpqua Bank judgment on the real property situated in King County commenced prior to any judgment lien commenced by LVB's registration of its judgment. Accordingly, the Trustee/SGB 2007 Trust has priority with respect to the King County real property assets titled in the judgment debtors, as well as the 721 250th Lane NE,

²⁰ Dkt. No. 42, Exhibit Z.

²¹ Dkt. No. 42 at ¶ 24.h.

1 Sammamish WA property. LVB did not even register its judgment in Hawaii, and thus it has
 2 no judgment lien on the real property located in Hawaii.

3 With respect to the personal property formerly owned by the judgment debtors and the
 4 personal property never owned by the judgment debtors, LVB concedes that the Trustee/SGB
 5 2007 Trust is in possession of those assets. No authority exists for a sheriff or United States
 6 Marshal to seize property from one creditor, regardless of whether that property was previously
 7 taken from a judgment debtor, to satisfy the claims of another creditor. LVB is free to arrest
 8 the M/V Bingo, although the first \$600,000 of any proceeds from the sale of the asset is
 9 payable to the Trustee/SGB 2007 Trust.

10 DATED this 21st day of September, 2018.

11 s/ Manish Borde
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 13 Manish Borde, WSBA #39503
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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification to the following:

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DATED this 21st day of September, 2018.

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